

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-2009

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**DLK ENTERPRISES, INC.,
a Wisconsin Corporation,**

Plaintiff-Appellant,

v.

**ALAN J. ROGERS,
DANIEL WILLIAMS,
MURIEL WILLIAMS
and BERNICE JOSEPH,**

Defendants-Respondents.

APPEAL from a judgment and an order of the circuit court for Walworth County: ROBERT J. KENNEDY, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. DLK Enterprises, Inc. appeals from a judgment and an order dismissing its action to enforce a constructive trust imposed against the partnership interest of Alan J. Rogers. It argues that a settlement between Rogers and partners Daniel and Muriel Williams, and Bernice Joseph, which permitted Rogers to forfeit his partnership interest, could not divest it of

the interest it acquired by the constructive trust. We conclude that DLK only had an interest in Rogers' rights to profits and surplus from the partnership and had no cause of action by way of "foreclosure" against partnership assets. We affirm the judgment and the order.

The underlying facts of this controversy were before the court in an earlier appeal. *Williams v. Rogers*, No. 94-3289, unpublished slip op. (Wis. Ct. App. Feb. 21, 1996). *Williams* affirmed a judgment determining that a partnership existed between Rogers, Daniel Williams and Ed Joseph (the "Block 14 Partnership") and that Rogers could not transfer his interest in the partnership or a specific interest in the shopping center owned by the partnership. In 1989, Rogers purported to assign to DLK his interest in the shopping center real estate and any partnership interest that Rogers might have in the property. DLK had paid Rogers \$60,000 for the assignment.

On August 12, 1994, in the earlier litigation, DLK obtained a judgment awarding it a constructive trust upon the one-third interest of Rogers "in and to the 'Block 14 Partnership,' which Constructive Trust shall apply to the first Sixty Thousand and no/100 (\$60,000.00) Dollars of partnership interest therein belonging to Alan Rogers." That judgment also voided Rogers' purported transfer of real estate and partnership interests.

DLK commenced this action to "foreclose" the constructive trust and enjoin the partners from defeating its interest. While the litigation was pending, Rogers reached a settlement with the partners¹ in the other litigation. Without monetary compensation, Rogers transferred whatever interest he had in the Block 14 Partnership to the remaining partners. The trial court dismissed the complaint against the Williamses and Joseph, concluding that it failed to state a claim upon which relief could be granted because Rogers no longer had any interest in the partnership.² The trial court also granted summary judgment

¹ Following the death of Ed Joseph, Bernice Joseph acquiesced to the continuation of the partnership business. *Williams v. Rogers*, No. 94-3289, unpublished slip op. at 17-18 (Wis. Ct. App. Feb. 21, 1996).

² It is unclear from the record whether the counterclaims for abuse of process and slander of title asserted by the Williamses have been adjudicated. We note that the trial court recognized that "the remainder of Bernice Joseph's counterclaim still technically exists." The trial court granted the counterclaims to the extent that they sought the lifting of a lis pendens filed against the real estate.

against Rogers.³

Whether the complaint states a claim for relief is a question of law which is reviewed independently on appeal. *Jensen v. Christensen & Lee Ins.*, 157 Wis.2d 758, 762, 460 N.W.2d 441, 443 (Ct. App. 1990). Although we would usually be limited by the facts in the complaint when determining whether a claim for relief is stated, *id.*, the motions for dismissal came after the filing of answers and in conjunction with DLK's motion for summary judgment. The trial court considered matters presented outside of the pleadings and therefore accorded summary judgment treatment to the motions. See § 802.06(2)(b) and (3), STATS. We discuss the legal issues keeping summary judgment methodology in mind.

DLK argues that upon entry of the constructive trust, DLK was the beneficial owner of Rogers' partnership interest. It contends that the interest could only be transferred by itself and its interest is not extinguished by the transfer to persons who are not bona fide purchasers.

We look at the judgment awarding the constructive trust. The trust was imposed against Rogers' partnership interest only and not against the real estate. In all its citations to cases enforcing constructive trusts, DLK repeatedly fails to recognize the distinction between a constructive trust imposed directly against real estate and that imposed against a partnership interest. The constructive trust was not a declaration of a \$60,000 debt against the partnership. It was not a determination that Rogers had a \$60,000 interest in the partnership.

(..continued)

If the counterclaims remain pending, appellate jurisdiction is defeated. *Brownsell v. Klawitter*, 99 Wis.2d 407, 299 N.W.2d 292 (Ct. App. 1980), *aff'd*, 102 Wis.2d 108, 306 N.W.2d 41 (1981). If appellate jurisdiction is questionable, we deem it appropriate to grant leave to appeal the order dismissing the complaints. Section 808.03(2), STATS. The judgment against Rogers was final and appealable as of right and the appeal would be before us in any case.

³ The effect of the summary judgment against Rogers is vague. The trial court's decision recognizes that summary judgment against Rogers on the constructive trust had no meaningful impact because Rogers no longer had an interest in the partnership. In this respect, the judgment against Rogers is adverse to DLK's interest and appellate standing exists.

The nature of a partner's interest is controlling. "A partner's interest in the partnership is the partner's share of the profits and surplus, and the same is personal property." Section 178.22, STATS. The constructive trust did not give DLK the right to participate in the management of partnership affairs. Section 178.23(1), STATS. DLK had no right to force the other partners to pay cash for Rogers' interest and no right to enjoin the other partners from entering into a settlement agreement with Rogers. The constructive trust only gave DLK an enforceable interest against Rogers' right to receive profits and surplus of the partnership.

It is undisputed that Rogers did not receive any positive cash flow from the surrender of his partnership interest. Simply, there were no proceeds to satisfy the constructive trust. Further, DLK's interest does not survive Rogers' forfeiture of his partnership interest. Contrary to DLK's assertion, none of the real property owned by the partnership became "trust property." "A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership." Section 178.21(3)(c), STATS. The only "trust property" was Rogers' share of profits and surplus, and there were none.

DLK argues that the trial court misused its discretion in refusing to permit it to amend its complaint against the Williamses and Joseph after the transfer of Rogers' partnership interest. DLK gives no indication what cause of action could have been stated against those parties. The issue is inadequately developed and we do not address it. See *Fryer v. Conant*, 159 Wis.2d 739, 746 n.4, 465 N.W.2d 517, 520 (Ct. App. 1990) (we will not consider an argument that is inadequately briefed). In light of Rogers' transfer of the partnership interest, we deem the error, if any, in not allowing DLK to attempt to formulate a cause of action against the Williamses and Joseph to be harmless. See § 805.18(2), STATS. A motion to dismiss the complaint would be granted in any event when under no conditions could DLK recover. *Jensen*, 157 Wis.2d at 763-64, 460 N.W.2d at 443.

DLK contends that Rogers, as a "trustee," did not have a right to turn over the interest in the partnership in exchange for a release or satisfaction of claims of the other partners. We need not decide whether Rogers was in fact a "trustee." DLK does not cite any authority prohibiting a "trustee" from disposing of property. If Rogers is deemed a "trustee," it may be that he

breached some type of fiduciary duty to DLK in his management and control of the "trust property," that is, his share of the partnership profits and surplus. That does not give DLK a cause of action against the Williamses and Joseph. Nor did DLK's complaint against Rogers assert such a cause of action.

DLK also argues that the lis pendens it filed against the partnership real estate should not have been released upon dismissal of the complaints. We have determined that the constructive trust did not give DLK an interest in specific partnership property. The earlier appeal also determined that Rogers could not convey an interest in specific partnership property. *Williams*, unpublished slip op. at 12. It makes no difference that the real estate was deeded to Rogers, Williams and Joseph as tenants in common.⁴ There is no doubt that DLK did not state a cause of action which would "confirm or change interests in the real property." See § 840.10(1), STATS.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

⁴ In its reply brief, DLK suggests that because the real estate was deeded to Williams, Joseph and Rogers as tenants in common, DLK acquired Rogers' undivided interest in the property. In *Williams*, unpublished slip op. at 9-10, we concluded that the fact that the deed designated the partners as tenants in common did not eviscerate the existence of the partnership and the fact that the real estate was partnership property. Further, the order imposing the constructive trust invalidated the real estate transfer.